No. 98-284

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1997

JAMES HAWTHORNE,

Petitioner,

vs.

UNIVERSITY OF WEST FLORIDA, FLORIDA BOARD OF REGENTS, General Counsel, JOHN MARTIN, EARL SMITH, DAN SIMPLE, RACHAEL BOOKER,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

BARBARA D. AUGER
Counsel of Record
PENNINGTON, MOORE, WILKINSON, BELL & DUNBAR, P.A.
Attorneys for Respondents
215 South Monroe Street
Suite 200
Tallahassee, Florida 32301
(850) 222-3533

148507

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Although somewhat inartfully drawn, Petitioner's Petition for Certiorari does in fact raise two issues. Properly restated, those questions are as follows:

1. Whether the Court of Appeals for the Eleventh Circuit erred in striking those portions of Petitioner's brief raising as error the District Court's refusal to grant relief from judgment under Rule 60(b), Fed. R. Civ. P., when no notice of appeal was ever filed after the district court's denial of relief?

2. Whether a claim of ineffective assistance of counsel under the Sixth Amendment to the United States Constitution can ever form the basis for relief from a judgment under Rule 60(b), Fed. R. Civ. P., when the underlying case is neither criminal nor penal in nature?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Cited Authorities iii

Facts and Procedural History 1

Analysis 3

A. Petitioner failed to file a timely Notice of Appeal 4

B. Petitioner's Initial Brief does not meet the requirements of a notice of appeal 8

C. Petitioner's ineffective assistance of counsel claim 9

D. Petitioner's claim of bias or prejudice 10

Conclusion 13

TABLE OF CITED AUTHORITIES

Cases:	Page
Acosta v. Louisiana Dept. of Health & Human Resources, 478 U.S. 251, 106 S. Ct. 2876, 92 L. Ed. 2d 192 (1986)	5
Brody v. President & Fellows of Harvard Coll., 664 F.2d 10 (1981)	12
Browder v. Director, Dept. of Corrections of Illinois, 434 U.S. 257, 98 S. Ct. 556, 54 L. Ed. 2d 521 (1978)	5
Easley v. Univ. of Michigan Bd. of Regents, 906 F.2d 1143 (6th Cir. 1990)	12
Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 103 S. Ct. 400, 74 L. Ed. 225 (1982)	5
Liljeburg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S. Ct. 2194 (1988)	11, 12
Link v. Wabash R. Co., 370 U.S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962)	10
Lunde v. Helms, 29 F.3d 367 (8th Cir. 1994)	11, 12
Pioneer Investment Svcs. Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993)	10
Smith v. Barry, 502 U.S. 244, 112 S. Ct. 678, 116 L. Ed. 2d 678 (1992)	8, 9

Table of Cited Authorities

	Page
Stone v. Immigration and Naturalization Service, 514 U.S. 386, 115 S. Ct. 1537, 131 L. Ed. 2d 465 (1995)	7
United States v. Robinson, 361 U.S. 220, 80 S. Ct. 282, 4 L. Ed. 2d 259 (1960)	5
Statutes:	
28 U.S.C. § 455 (1997)	3, 11, 12, 14
28 U.S.C. § 455(b)(4) (1997)	11
28 U.S.C. § 455(d)(4) (1997)	12
United States Constitution:	
Sixth Amendment	i, 9, 11
Rules:	
Fed. R. App. P. 4	7, 8, 9
Fed. R. App. P. 4(a)	4
Fed. R. App. P. 4(a)(1)	8
Fed. R. App. P. 4(a)(2)	5
Fed. R. App. P. 4(a)(4)	6, 7, 8

Table of Cited Authorities

	Page
Fed. R. App. P. 4(a)(4)(F)	7
Fed. R. Civ. P. 60	6
Fed. R. Civ. P. 60(b)	*passim*
Other Authority:	
Pub. L. 101-649, 104 Stat. 5048	7

APPENDIX

Appendix A — Order Of The United States District Court For The Northern District Of Florida, Pensacola Division Filed October 22, 1996 ..... 1a

Appendix B — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Filed October 31, 1997 ..... 14a

As is plainly evident from the foregoing, Petitioner's case rests entirely on his two claims for relief under Rule 60(b), Fed. R. Civ. P. Because Petitioner failed ever to timely file any document which could reasonably be construed to serve as a "Notice of Appeal" from the District Court's denial of his Motion for Relief under Rule 60(b), these issues were not properly preserved for appeal. For that reason, the Court of Appeals for the Eleventh Circuit correctly dismissed those portions of Petitioner's Brief seeking reversal of the District Court's denial of relief under the rule. Therefore, since resolution of the first issue is dispositive of the second, the Court need not reach the second issue. Nonetheless, in an abundance of caution, both issues will be addressed on the merits.

FACTS AND PROCEDURAL HISTORY

The facts of this case are relatively simple and well-stated by the District Court:

> [Petitioner] James Hawthorne, a black male, began working at the University of West Florida ("UWF") as a custodian in 1981. At least as early as 1987, UWF experienced problems with Hawthorne, his job performance, and his attitude. From April 8, 1987, through February 13, 1991, Hawthorne had in excess of fifty incidents for which he was orally reprimanded or counseled regarding inappropriate procedure or behavior. On February 27, 1991, Hawthorne received a written reprimand for his harassment of other employees who provide services to UWF. Thereafter, for the next year, Hawthorne continued to behave improperly, and he committed at least another twenty-five violations for which he was again counseled, issued four

> written reprimands, suspended on three occasions, and issued two "below standards" performance appraisals. On February 25, 1992, Hawthorne was discovered using a phone in a locked faculty office in violation of UWF standards of conduct and in direct contravention of his earlier counseling concerning the use of phones in unauthorized areas. After Hawthorne had been counseled for the February 25, 1992, violation, he was overheard by a number of witness [sic] to say "I'll use any phone I want when I get good and ready." UWF terminated Hawthorne from his employment on March 2, 1992.
>
> On August 30, 1995, Hawthorne filed an amended complaint in this court under Title VII, alleging that in September of 1991, he was denied a promotion to the position of coordinator in the Building Services Department on the basis of his race. Hawthorne's complaint also allege[d] that the [Respondent] terminated him from his job in retaliation for making inquiries to the personnel department about his denial of the promotion.

Hawthorne v. Board of Regents of the State University System, No. 95-30274/RV (N.D. Fla. 1997), at 2. A Copy of the District Court's order is attached hereto as Exhibit "A." After extensive discovery, the District Court, honorable Roger Vinson, entered final summary judgment in favor of UWF, finding that Hawthorne could not prove a prima facie case of discrimination or retaliation under Title VII. *See id.* Petitioner filed a timely notice of appeal in the District Court on Nov. 21, 1996. On or about Feb. 24, 1997, Petitioner filed a Motion for Relief from Judgment[1] alleging as grounds for relief, that his

1. Petitioner's Motion for Relief under Rule 60(b) was entitled, "Motion Under Fed. R. Civ. P. Rule 60 and Motion to Relinquish Jurisdiction."

attorney had provided inadequate representation, and that Judge Vinson should have recused himself because his prior contributions to UWF amounted to bias sufficient to invoke the provisions of 28 U.S.C. § 455 (1997).[2] On March 13, 1997, the District Court denied Petitioner's Rule 60(b) Motion. On June 2, 1997, Petitioner filed his Initial Brief in the Court of Appeals for the Eleventh Circuit. Petitioner never filed a second notice of appeal after the denial of his Motion for Relief under Rule 60(b). Nonetheless, Petitioner argued in his brief, Parts II and III, that the District Court erred in denying his Rule 60(b) motion. On Oct. 31, 1997, a panel of the Eleventh Circuit affirmed the summary judgment entered below, in a brief unpublished opinion. A copy of the Eleventh Circuit's opinion is attached hereto as Exhibit "B." In a footnote to the opinion, the Court granted UWF's motion to strike issues II and III of Petitioner's brief. From the Eleventh Circuit's affirmance, Petitioner seeks review in this Court.

ANALYSIS

As previously stated, Petitioner's entire case in this Court turns on his failure to file a Notice of Appeal from the District Court's denial of his Motion for Relief from Judgment under Rule 60(b). Because the filing of a Notice of Appeal is mandatory and jurisdictional, Petitioner failed properly to preserve the denial of his Rule 60(b) motion for appellate review. Since he failed properly to invoke the jurisdiction of the Eleventh Circuit with respect to his Rule 60(b) motion, that Court properly struck the portion of Petitioner's brief seeking reversal of the District Court's order. Having failed to preserve

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2. Although Petitioner did not specifically rely on 28 U.S.C. § 455, it may be reasonably inferred from the language in his motion that as a result of Judge Vinson's de-minimis contributions to UWF, "his impartiality might reasonably be questioned." *See* discussion, *infra*, Part II D.

the question in the court below, Petitioner has also failed to preserve the question for review by this Court. Therefore, the Petition for Writ of Certiorari must be DENIED.

A. Petitioner failed to file a timely Notice of Appeal

As previously noted, Petitioner's Notice of Appeal was filed within 30 days of entry of the District Court's order granting summary judgment in favor of UWF (Nov. 21, 1996). Over four months later, his Motion for Relief under Rule 60(b) was denied (March 13, 1997). *Thereafter, Petitioner never filed another notice of appeal.* In his Initial Brief,[3] however, he raised as error the District Court's denial of his Rule 60(b) motion. Under the Federal Rules of Appellate Procedure, in order to appeal the denial of his Rule 60(b) motion, Petitioner would have had to file a notice of appeal, or some other document which could reasonably construed as such no later than April 13, 1997. Because he failed to do so, the Eleventh Circuit had no jurisdiction to consider that portion of his appeal and thus properly struck the portion of his brief addressing that issue.

Rule 4(a), Fed. R. App. P. provides:

> (1) Except as provided in paragraph (a)(4) of this Rule, in a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30

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3. Although Petitioner entitled his first brief "answer brief of appellee" that document was his "initial" brief filed. Petitioner's first brief did not contain any argument regarding his Rule 60(b) motion. After filing his first brief, Petitioner subsequently filed an amended brief (entitled "initial brief") which addressed his Rule 60(b) claims therein. It was to this amended brief which Respondent moved to strike parts II and III.

> days after the date of entry of the judgment or order appealed from. . . .

This Court has long held that the filing of a timely Notice of Appeal is "mandatory and jurisdictional." *Browder v. Director, Dept. of Corrections of Illinois*, 434 U.S. 257, 264, 98 S. Ct. 556, 561, 54 L. Ed. 2d 521, 527 (1978), quoting *United States v. Robinson*, 361 U.S. 220, 229, 80 S. Ct. 282, 288, 4 L. Ed. 2d 259 (1960). Further, as noted by this Court,

> [t]he filing of a notice of appeal is an event of jurisdictional significance — it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.

Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58, 103 S. Ct. 400, 402, 74 L. Ed. 225, 227 (1982). Thus, Petitioner's failure ever to file a notice of appeal with regard to his Rule 60(b) motion, unless excused by some other applicable rule, was fatal to his appeal of the District Court's denial thereof.

Of course Rule 4(a)(2), Fed. R. App. P. provides a means whereby a notice of appeal filed prior to final resolution of the underlying case can "relate forward" to the date on which the case is finally disposed of. The rule states, "A notice of appeal filed after the court announces a decision or order but before the entry of the judgment or order is treated as filed on the date of and after the entry." As this Court has recognized, this exception was intended to mitigate the harsh result of rendering a previously filed notice of appeal a legal nullity simply because a post-trial motion is later filed. *See Acosta v. Louisiana Dept. of Health & Human Resources*, 478 U.S. 251, 106 S. Ct. 2876, 92 L. Ed. 2d 192 (1986). Petitioner does not fit within this exception because his notice of appeal was not filed before entry of the order granting summary judgment.

If Petitioner's first notice of appeal was to be effective to appeal the denial of his Rule 60(b) motion, it would have to fit within one of the six exceptions to the 30-day time limit for filing a notice of appeal embodied in Rule 4(a)(4), Fed. R. App. P. The Rule states:

> If any party files a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Federal Rules of Civil Procedure:
>
> (A) for judgment under Rule 50(b);
>
> (B) to amend or make additional findings of fact under rule 52(b), whether or not granting the motion would alter the judgment;
>
> (C) to alter or amend the judgment under Rule 59;
>
> (D) for attorney's fees under Rule 54 if a district court under Rule 58 extends the time for appeal;
>
> (E) for a new trial under Rule 59; or
>
> (F) for relief under Rule 60 *if the motion is filed no later than 10 days after the entry of the judgment* (emphasis added).

The only possible exception of which Petitioner could avail himself in this case is subdivision (F). Under the explicit language of the Rule, however, Petitioner is clearly excluded from its operation. His motion for relief under Rule 60 was filed on Feb. 24, 1997, just over three months after entry of

summary judgment against him. Thus, Petitioner cannot claim the benefits of Rule 4(a)(4) either.

This Court recently undertook to address the interplay between Rule 60(b), Fed. R. Civ. P. and Rule 4, Fed. R. App. P. In *Stone v. Immigration and Naturalization Service*, 514 U.S. 386, 115 S. Ct. 1537, 131 L. Ed. 2d 465 (1995), the Court, in comparing appellate practice under the Federal Rules to that under the Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 5048, elaborated on recent amendments to Rule 4. Justice Kennedy, writing for the majority, stated:

> With the exception noted,[4] the filing of a Rule 60(b) motion does not toll the running of the time for taking an appeal, . . . and the pendency of the motion before the district court does not affect the continuity of a prior-taken appeal. . . . Either before or after filing his appeal, the litigant may also file a Rule 60(b) motion for relief with the district court. The denial of the motion is appealable *as a separate final order*, and if the original appeal is still pending it would seem that the court of appeals can consolidate the proceedings.

Stone, 514 U.S. at 396, 115 S. Ct. at 1547, 131 L. Ed. 2d at 475. The conclusion is clear from the foregoing: since a Rule 60(b) motion filed more than ten days after the entry of summary judgment does not toll the time for appeal, it results in a separate final order for purposes of appeal and, consequently, the filing of a second and separate notice of appeal in order to preserve an appeal based on the Rule 60(b) motion. Thus, Petitioner's initial notice of appeal was effective only to appeal the district court's order granting summary judgment, not the denial of his

4. The relevant exception is the 10-day time limit contained in Rule 4(a)(4)(F), Fed. R. App. P., discussed *supra*.

Rule 60(b) motion. Therefore, the Court of Appeals properly refused to consider issues II and III of Petitioner's brief.

B. Petitioner's Initial Brief does not meet the requirements of a notice of appeal

This Court has recognized a very narrow exception to the rule that a notice of appeal must be filed in order to confer jurisdiction on the Court of Appeals. In *Smith v. Barry*, 502 U.S. 244, 112 S. Ct. 678, 116 L. Ed. 2d 678 (1992), this Court held that a brief filed by a pro se litigant within the time required by Rule 4(a)(1) was sufficient to meet the technical requirements of a notice of appeal. In *Smith*, the pro se plaintiff who suffered an adverse final judgment filed a notice of appeal before a motion for J.N.O.V. was finally disposed of. Noting that the notice of appeal was invalid under Rule 4(a)(4), the Court undertook to consider whether the plaintiff's later filed brief, which was filed within the 30-day time limit in Rule 4(a)(1) could serve as the functional equivalent of the notice of appeal. In finding that it did, the Court stated:

> While a notice of appeal must specifically indicate the litigant's intent to seek appellate review, . . . the purpose of this requirement is to ensure that the filing provides sufficient notice to other parties and the courts. . . . If a document filed within the time specified by Rule 4 gives the notice required by Rule 3, it is effective as a notice of appeal.

Smith, 502 U.S. at 248, 112 S. Ct. at 682, 116 L. Ed. 2d at 682 (internal citations omitted).

Petitioner cannot avail himself of this narrow exception, because his brief, unlike the plaintiff's brief in *Smith*, was not filed within the time specified by Rule 4. Quite to the contrary,

his brief was filed on June 2, 1997, almost three months from the date of Judge Vinson's order denying Petitioner's Rule 60(b) motion. Since the Court made absolutely clear in *Smith* that filing the brief within the time limit specified in Rule 4 was a prerequisite to invocation of the rule, Petitioner cannot avail himself of that narrow exception. Therefore, since he neither filed a second notice of appeal, nor any document which could reasonably be construed as a notice of appeal, on May 13, 1997, the date on which the time to file an appeal based on the Rule 60(b) motion expired, his right to appeal on that basis was extinguished. His Petition for Writ of Certiorari based on that order therefore must be denied.

C. Petitioner's ineffective assistance of counsel claim

It is a hornbook principle of constitutional law that the Sixth Amendment right to effective assistance of counsel applies only in criminal prosecutions. The amendment states in pertinent part, "*In all criminal prosecutions*, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence." U.S. CONST., Adt. VI (emphasis added). Petitioner in this case seeks to elevate his allegation that his attorney "misrepresented him"[5] to the level of a constitutional violation, justifying a complete disregard of the Federal Rules of Appellate Procedure. Having failed *himself* properly to preserve this issue for appeal, Petitioner cannot now rely on that claim to justify consideration of an appeal over which the Court of Appeals never had jurisdiction.

The rule in civil cases is simple: the proper remedy for negligence by counsel is a suit for malpractice against that

5. Throughout his Petition for Writ of Certiorari, Petitioner uses the term "misrepresentation" to refer to what can only be interpreted as a claim of malfeasance or misfeasance on the part of his attorney who was subsequently reprimanded by the Florida Supreme Court.

attorney, not relief from a properly entered order granting summary judgment. This principle was reaffirmed by this Court as recently as 1993. In *Pioneer Investment Svcs. Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993), Justice White speaking for the majority stated:

> . . . [W]e have held that clients must be held accountable for the acts and omissions of their attorneys. . . . In so concluding, we found "no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client." . . . "Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent."

Pioneer, 507 U.S. at 396, 113 S. Ct. at 1499, 123 L. Ed. 2d at 90, quoting *Link v. Wabash R. Co.*, 370 U.S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962) (internal citations omitted). Whether or not Petitioner's attorney was in fact negligent in prosecuting his case is irrelevant here. Having freely chosen her to represent him, he is bound by her acts in his representation. His only legal remedy for any acts of negligence on the part of his attorney is against that attorney. To allow reopening of the summary judgment entered in favor of UWF over a year later, aside from seriously prejudicing UWF's rights, is simply not a legally recognized remedy for his attorney's alleged misconduct.

D. Petitioner's claim of bias or prejudice

In addition to his claim of ineffective assistance of counsel, Petitioner also claimed, as grounds for relief under Rule 60(b),

that Judge Vinson was biased within the meaning of 28 U.S.C. § 455 (1997).[6] Although Petitioner has not specifically raised this claim in his Petition for Writ of Certiorari, it is implicit therein, since judicial bias is one of the grounds for his claim to relief under Rule 60(b), as is his Sixth Amendment claim.

As a preliminary matter, it is important to note that Petitioner never filed a motion for recusal in the District Court. Only upon the Eleventh Circuit's affirmance of the District Court's order did Petitioner raise judicial bias as grounds for relief from the judgment under Rule 60(b). Assuming Petitioner had properly preserved the issue for appeal to the Eleventh Circuit, the fact that he seeks relief under Rule 60(b) for alleged bias would not necessarily be fatal to his claim. As this Court has recognized, section 455 can serve as a basis for relief from judgment in the proper circumstances. *See Liljeburg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S. Ct. 2194 (1988). Those circumstances, however, are not present here.

Petitioner alleges bias on the part of Judge Vinson based on his past contributions to UWF. Without more, this is an insufficient basis for recusal under section 455, whether before or after judgment. Of the Circuit Courts which have considered the issue, none has found this connection alone sufficient to warrant section 455 relief. For example, in *Lunde v. Helms*, 29

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6. Section 455, as amended, requires a district judge to recuse himself "in any proceeding in which his impartiality might reasonably be questioned." In addition, the statute requires recusal in a number of specified circumstances, including where

> He knows that he, individually or as a fiduciary, . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

28 U.S.C. § 455(b)(4) (1997).

F.3d 367 (8th Cir. 1994), the Eighth Circuit Court of Appeals held that a district judge's refusal to recuse himself on the ground that he had both graduated from the defendant University and made contributions thereto was well within the judge's discretion and not subject to reversal. *Lunde*, 29 F.3d at 370-71. After dispensing with the judge's alumnus status as a ground for recusal, the court considered the judge's contributions to the university, stating, "We do not think that making alumni contributions or participating in university educational programs, without more, is a reasonable basis for questioning the judge's impartiality." *Id.* at 371. *See also Easley v. Univ. of Michigan Bd. of Regents*, 906 F.2d 1143 (6th Cir. 1990) (holding district judge's graduation from defendant university and continuing ties therewith insufficient to constitute bias under section 455); *Brody v. President & Fellows of Harvard Coll.*, 664 F.2d 10 (1981) (same).

The relevant inquiry under section 455 is an objective one: whether an objective observer could reasonably believe that the judge's ties with the defendant create an appearance of partiality. *See Liljeburg, supra*. This court found section 455's standard met in *Liljeburg*, based on the fact that the district judge was a member of the board of trustees of the defendant, which stood to gain financially by a decision in its favor.[7] *Liljeburg, supra*, 486 U.S. 860-71, 108 S. Ct. at 2202-08. Any reasonable observer could easily conclude that where a judge who is a board member of a corporation litigating a nearly $6,700,000 real estate sale in his courtroom might not appear completely impartial. Thus the decision in *Liljeburg*. This case, however, comes nowhere near the facts of *Liljeburg*. Judge

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7. It is noteworthy that the situation in *Liljeburg* was also specifically governed by the language of section 455, which defines a financial interest as "ownership of a legal or equitable interest, however small, *or a relationship as a director, adviser, or other active participant* in the affairs of a party. . . ." 28 U.S.C. § 455(d)(4) (1997).

Collier would be utterly unaffected financially even in the event of a substantial judgment against UWF. Therefore, consonant with the Circuit Court decisions on identical facts, his contributions to UWF alone cannot constitute grounds for relief from judgment under Rule 60(b), even if Petitioner had properly preserved this issue for appeal, which he clearly did not.

CONCLUSION

This Court's precedents make clear that, in order to properly preserve a litigant's right to appeal, a timely-filed notice of appeal is both mandatory and jurisdictional. Also clear is the fact that a motion for relief under Rule 60(b), which is filed more than ten days after entry of the final judgment does not toll the time for appeal of the underlying judgment and requires a separate notice of appeal in order to preserve the right to claim error in the denial thereof. Having filed neither a timely notice of appeal, nor any document which could reasonably be construed to be a notice of appeal, Petitioner has failed to meet the requirements for appellate jurisdiction over this appeal. Furthermore, because both issues raised in his Petition for Writ of Certiorari depend on the timely filing of the notice of appeal, neither issue was properly before the Court of Appeals. Thus, *a fortiori*, this Court lacks jurisdiction to determine those issues.

Regardless of the fact that Petitioner failed to satisfy the jurisdictional prerequisites to appellate review, his claim of ineffective assistance of counsel in this civil case, is clearly without merit. Neither this Court nor any other federal court has ever held that ineffective assistance of counsel in a civil case rises to the level of a constitutional violation, justifying departure from well-settled precedent. Furthermore, Petitioner's alternate and implicit ground for relief under Rule 60(b), the district judge's alleged bias, is also wholly without merit.

Neither this Court nor any Court of Appeals considering the issue has ever found contributions to a party university to be a sufficient ground to require recusal under section 455. In sum, because Petitioner has failed to present any issue over which this Court could validly preside, his Petition for Writ of Certiorari must be denied.

Wherefore, Respondent respectfully requests that this Court DENY Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

BARBARA D. AUGER
Counsel of Record
PENNINGTON, MOORE,
WILKINSON, BELL
& DUNBAR, P.A.
Attorneys for Respondents
215 South Monroe Street
Suite 200
Tallahassee, Florida 32301
(850) 222-3533

APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, PENSACOLA DIVISION FILED OCTOBER 22, 1996

IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF FLORIDA PENSACOLA DIVISION

CASE NO. 95-30274/RV

JAMES HAWTHORNE,

Plaintiff,

v.

THE BOARD OF REGENTS OF THE STATE UNIVERSITY SYSTEM d/b/a THE UNIVERSITY OF WEST FLORIDA, JOHN MARTIN, individually, EARL SMITH, individually, DAN SIMPLE, individually, and RACHAEL BOOKER, individually,

Defendants.

ORDER

Pending is the motion of defendant The Board of Regents of the State University System d/b/a The University of West Florida for summary judgment. (Doc. 41).

I. BACKGROUND

This is an employment discrimination action, brought pursuant to Title VII of the Civil Rights Act of 1964 [42 U.S.C.

§§ 2000e, *et seq.*]. Except as noted, the following material facts are undisputed in the record.[1]

Plaintiff James Hawthorne, a black male, began working at the University of West Florida ("UWF") as a custodian in 1981. At least as early as 1987, UWF experienced problems with Hawthorne, his job performance, and his attitude. From April 8, 1987, through February 13, 1991, Hawthorne had in excess of fifty incidents for which he was orally reprimanded or counseled regarding inappropriate procedure or behavior. On February 27, 1991, Hawthorne received a written reprimand for his harassment of other employees who provide services to UWF. Thereafter, for the next year, Hawthorne continued to behave improperly, and he committed at least another twenty-five violations for which he was again counseled, issued four written reprimands, suspended on three occasions, and issued two "below standards" performance appraisals. On February 25, 1992, Hawthorne was discovered using a phone in a locked faculty office in violation of UWF standards of conduct and in direct contravention of his earlier counseling concerning the use of phones in unauthorized areas. After Hawthorne had been counseled for the February 25, 1992, violation, he was overheard by a number of witness to say "I'll use any phone I want when I get good and ready." UWF terminated Hawthorne from his employment on March 2, 1992.

On August 30, 1995, Hawthorne filed an amended complaint in this court under Title VII, alleging that in

1. All of the following facts are contained in the Defendant's statement of undisputed facts and are supported by the record. Because the Plaintiff has failed to controvert the Defendant's statement, these facts are admitted as true. *See* Local Rule 56.1 (A). Further, upon reviewing all of the record evidence in this case, it appears that these facts are undisputed, except as noted in the text.

September of 1991, he was denied a promotion to the position of coordinator in the Building Services Department on the basis of his race. Hawthorne's complaint also alleges that the defendants terminated him from his job in retaliation for making inquiries to the personnel department about his denial of the promotion. Defendant UWF now moves for summary judgment.

II. ANALYSIS

A. *Summary Judgment Standard*

A motion for summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), Fed. R. Civ. P. "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265, 273 (1986). *See Everett v. Napper,* 833 F. 2d 1507, 1510 (11th Cir. 1987).

However, summary judgment is improper "[i]f a reasonable fact finder could draw more than one inference from the facts, and that inference creates a genuine issue of material fact." *Cornelius v. Highland Lake,* 880 F.2d 348, 351 (11th Cir. 1989), *cert. denied,* 494 U.S. 1066, 110 S. Ct. 1784, 108 L. Ed. 2d 785 (1990). An issue of fact is "material" if it might affect the outcome of the case under the governing law. *Anderson v.*

Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986). It is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the non-moving party. *Id. See also Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, 552 (1986).

Conclusory allegations based on speculation, subjective beliefs, or bald assertions based upon unsubstantiated hearsay are insufficient to create a "genuine issue of material fact." *Carter v. Miami*, 870 F.2d 578, 585 (11th Cir. 1989); *Ramsey v. Leath*, 706 F.2d 1166, 1170 (11th Cir. 1983). On the other hand, if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party, then the issue of fact is genuine. *Matsushita Elec. Industrial Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, 552 (1986). On a summary judgment motion, the record and all reasonable inferences that can be drawn from it must be viewed in the light most favorable to the non-moving party. *McCabe v. Sharett*, 12 F.3d 1558, 1560 (11th Cir. 1994).

B. *Title VII*

(1) **Race Discrimination.** Title VII of the Civil Rights Act of 1964 provides that it is unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (1988). The plaintiff may establish a prima facie case of discrimination under Title VII on the basis of statistical proof of a pattern of discrimination [see *Verbraeken v. Westinghouse Elec. Com.*, 881 F.2d 1041 , 1045 (11th Cir. 1989), *cert. dismissed*, 493 U.S. 1064, 1 10

S.Ct. 884, 107 L.Ed.2d 1012 (1990)], or on the basis of direct evidence of discrimination, which consists of "evidence which, if believed, would prove the existence of discrimination without inference or presumption." *Carter v. City of Miami*, 870 F.2d 578, 581-82 (11th Cir. 1989). In the usual case, however, direct evidence is not present, and the plaintiff must rely on circumstantial evidence to prove discriminatory intent, using the framework established in *McDonnell Douglas Corp. v. Green*, 41 1 U.S. 792, 802-04, 93 S.Ct. 1817, 1824-25, 36 L.Ed.2d 668 (1973).

Under *McDonnell Douglas*, a plaintiff establishes a prima facie case of race discrimination under Title VII by showing: (1) he belongs to a racial minority; (2) he was subjected to adverse job action; (3) his employer treated similarly situated employees outside his classification more favorably; and (4) he was qualified to do the job. *McDonnell Douglas Corp., supra*, 411 U.S. at 802, 93 S.Ct. at 1824, 36 L.Ed.2d at 677; *Coutu v. Martin County Bd. of County Comm'rs*, 47 F.3d 1068, 1073 (11th Cir. 1995); *Turnes v. AmSouth Bank, N.A.*, 36 F.3d 1057, 1060 (11th Cir. 1994); *see also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506, 113 S.Ct. 2742, 2747, 125 L.Ed.2d 407 (1993). Demonstrating a prima facie case is not onerous; it requires only that the plaintiff establish facts adequate to permit an inference of discrimination. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253-54, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207, __ 1981); *Williams v. Ford Motor Co.*, 14 F.3d 1305, 1308 (8th Cir. 1994).

In this case, the plaintiff is a black male who was not promoted to the position of coordinator. Instead, the position was awarded to James Holt, a white male. Therefore, Hawthorne has satisfied the first three elements of his prima facie case.

However, Hawthorne has failed to established the fourth and final element of his prima facie case because he has not presented any evidence that was qualified to perform the job of coordinator. It is uncontroverted in this case that during the relevant time period, the Building Services Department was in the midst of a reorganization, with attending moving of offices and equipment, and UWF needed someone with moving experience to fill the position of coordinator. Holt was the only employee at that time with moving experience, having worked a number of years as a manager for U-Haul. Hawthorne had no moving experience. Additionally, the record makes it abundantly clear that Hawthorne had a long and consistent history of poor job performance, which would have apparently excluded him from consideration in any event. Therefore, Hawthorne has failed to establish a prima facie case of race discrimination.

However, even assuming that Hawthorne has established a prima facie case, UWF is still entitled to summary judgment. Once the plaintiff has established a prima facie case, thereby raising an inference that he was the subject of intentional race discrimination, the burden shifts to the defendant to rebut this inference by presenting legitimate, non-discriminatory reasons for its employment action. *Burdine, supra,* 450 U.S. at 254, 101 S.Ct. at 1094, 67 L.Ed.2d at __. This intermediate burden is "exceedingly light." *Turnes, supra,* 36 F.3d at 1061.

As noted, UWF asserts that Hawthorne was not promoted because he did not have any moving experience, a necessary qualification for the job. Additionally, according to UWF, Hawthorne's poor job performance and negative attitude prevented him from becoming a viable candidate for any promotion during his employment at UWF. The defendant has

clearly met its burden of presenting legitimate, nondiscriminatory reasons for the selection of Holt, rather than Hawthorne, for the coordinator position. Where the defendant meets this burden, the plaintiff has the opportunity to demonstrate that the defendant's articulated reason for the adverse employment action is a mere pretext for discrimination. *McDonnell Douglas, supra,* 411 U.S. at 804, 93 S.Ct. at 1825, 36 L.Ed.2d at ; *Roberts v. Gadsden Memorial Hosp.,* 835 F.2d 793, 796 (11th Cir. 1988). This demonstration merges with the plaintiff's ultimate burden of showing that the defendant intentionally discriminated against the plaintiff. *St. Mary's Honor Ctr. v. Hicks, supra,* 509 U.S. at 511, 113 S.Ct. at 2749, 125 L.Ed.2d at 422; *Pignato v. American Trans Air, Inc.,* 14 F.3d 342, 346-47 (7th Cir.); *cert. denied,* __ U.S. __, 114 S.Ct. 2675, 129 L.Ed.2d 810 (1994). Put another way, once the employer succeeds in carrying its intermediate burden of production, the ultimate issue in the case becomes whether the plaintiff has proven that the employer intentionally discriminated against him because of his race. *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.,* __ F.3d __ , 1996 WL 531799 at *4 (11th Cir. Sept. 19, 1996); *Turnes v. AmSouth Bank, N.A.,* 36 F.3d 1057, 1061 (11th Cir. 1994).

Hawthorne has failed to establish that the defendant's proffered reason is unworthy of credence, or that the defendant was more likely motivated by a discriminatory reason in failing to select Hawthorne for the promotion. *See Karazanos v. Navistar Int'l Transp. Corp.,* 948 F.2d 332, 336 (7th Cir. 1991). Hawthorne's main contention is that he was just as qualified as Holt, and that discrimination must have played a role in the defendant's decision not to hire him. However, even if the record evidence supported Hawthorne's assertion that he and Holt were equally qualified (which it does not), "the employer

has the discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria." *Burdine, supra,* 450 U.S. at 259, 101 S.Ct. at 1097, 67 L.Ed.2d at __. Moreover, Hawthorne's assertion that the defendants' failed to promote him on the basis of his race is completely unsubstantiated. The undisputed testimony of Bertha Jones, the Superintendent of the Building Services Department, is that Holt was awarded the promotion because he possessed significant moving experience that Hawthorne lacked. The record evidence also establishes beyond any doubt that Hawthorne had exhibited a lengthy and clear pattern of poor job performance prior to the time he was denied promotion. Hawthorne's conclusory allegations of discrimination, unsupported by affidavit or evidence, are totally insufficient to create an issue of fact. *Isenbergh, supra,* __ F.3d at __ 1996 WL 531799 at *8; *Meiri v. Dacon,* 759 F.2d 989, 998 (2d Cir.), *cert. denied,* 474 U.S. 829, 106 S.Ct. 91, 88 L.Ed.2d 74 (1985); *Forsberg v. Pacific Northwest Bell Tel. Co.,* 840 F.2d 1409, 419 (9th Cir. 1988). Since the defendant has proffered evidence supporting a legitimate, nondiscriminatory reason for not promoting Hawthorne, and Hawthorne has not come forward with any evidence to show that this reason is pretextual, summary judgment is warranted. *See Richmond v. Board of Regents of University of Minnesota,* 957 F.2d 595, 598 (8th Cir. 1992); *Karazanos, supra,* 948 F.2d at 336.

(2) Retaliation. The Plaintiff also alleges that he was fired in retaliation for his inquiries into Holt's promotion. UWF contends that Hawthorne has failed to establish a causal connection between his inquiries into Holt's promotion and his termination. UWF further contends that even if the plaintiff can establish a prima facie case of retaliation, UWF had legitimate, non-discriminatory reasons for terminating the plaintiff.

To establish a prima facie case of retaliation, the plaintiff must show: (1) that he engaged in statutorily protected expression; (2) that he suffered an adverse employment action; and (3) that there is some causal relationship between the two events. *Meeks v. Computer Associates Int'l*, 15 F.3d 1013, 1021 (11th Cir. 1994); *E.E.O.C. v. Ohio Edison* Co., 7 F.3d 541 (6th Cir. 1993); *Archuleta v. Colorado Dept. of Institutions*, 936 F.2d 483 (10th Cir. 1991). "To recover for retaliation, the plaintiff 'need not prove the underlying claim of discrimination which led to [his] protest,' so long as [he] had a reasonable good faith belief that the discrimination existed." *Meeks, supra,* 15 F.3d at 1021 *(quoting Tipton v. Canadian Imperial Bank of Commerce,* 872 F.2d 1491, 1494 (11th Cir. 1989)).

To meet the causal link requirement, the plaintiff "merely has to prove that the protected activity and the negative employment action are not completely unrelated." *E.E.O.C. v. Reichhold Chemical, Inc.*, 988 F.2d 1564, 1571-72 (11th Cir. 1993). The plaintiff must at least establish that the employer was actually aware of the protected expression at the time the employer took adverse employment action against the plaintiff. *Goldsmith v. City of. Atmore,* 996 F.2d 1155, 1163 (11th Cir. 1993); *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1524 (11th Cir. 1991). The employer's awareness of the statement may be established by circumstantial evidence. *Id.*

As in his race discrimination claim, once the plaintiff establishes his prima facie case, the employer must proffer a legitimate, non-discriminatory reason for the adverse employment action. *Reichhold Chemical, supra,* 988 F.2d at 1571-72. If the employer offers legitimate reasons for the employment action, the plaintiff must then demonstrate that the employer's proffered explanation is a pretext for retaliation.

Meeks, supra, 15 F.3d at 1021; *Goldsmith, supra,* 996 F.2d at 1163.

Here, the record shows that at the time Hawthorne was fired, UWF was aware of his inquiries into Holt's promotion. In fact, Hawthorne had made repeated inquiries to the UWF Human Resources office regarding the qualifications of Holt. I assume that such inquiries are "protected activity," although that may be questionable. Therefore, taken in a light most favorable to the plaintiff, it appears that UWF was aware of the protected activity, and that "the protected activity and the negative employment action are not completely unrelated." *Reichhold Chemical, supra,* 988 F.2d at 1571-72. Thus, I next examine the defendant's reasons for the negative action.

UWF maintains that it fired Hawthorne because he was caught in a locked faculty office using an unauthorized phone. This violated the Standards of Conduct of UWF for "Unauthorized Use of State Property" and for "Misuse of Position." Additionally, Hawthorne had been counseled twice before for violating UWF's policy forbidding the unauthorized use of phones. Finally, despite a third counseling session following Hawthorne's latest use of an unauthorized phone, Hawthorne was overheard to say "I'll use any phone I want when I get good and ready."

UWF's reasons for firing the plaintiff are more than sufficient to meet its intermediate burden. Any reasonable employer would be fully justified in terminating an employee under similar circumstances, or much earlier. Further, as with his discrimination claim, Hawthorne has failed to demonstrate that the employer's proffered explanation is a pretext for retaliation. *Meeks, supra,* 15 F.3d at 1021; *Goldsmith, supra,*

996 F.2d at 1163. The undisputed evidence is that the plaintiff was caught using an unauthorized phone in contravention of UWF policy and his previous counseling. This, in combination with his insubordination and repeated violations, resulted in his termination. Plaintiff has offered nothing to contest this conclusion, other than his own unsupported allegations of retaliation.[2] Consequently, in this case, the defendant's evidence of a legitimate, non-discriminatory reason for its action is so strong as to rebut completely any inference of retaliation. *See Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 596 (11th Cir. 1987). The record is simply not sufficient to create an issue of fact in light of the substantial evidence of lawful motive presented by the defendant. *See Holt v. KMI-Continental, Inc.*, __ F.3d __ 1996 WL 497199 at *6 (2d Cir. Sept. 4, 1996). As a result, the UWF is entitled to summary judgment on the Plaintiff's retaliation claim.

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2. Furthermore, even if Hawthorne had presented evidence that UWF retaliated against him for making inquiries into Holt's promotion, which he has not, summary judgment would still be appropriate because of the unreasonable manner in which Hawthorne made his inquires. It is uncontroverted that Hawthorne, without the permission of his supervisors, spent a significant amount of time during work hours at the Human Resources office making his requests, and that this interfered with Hawthorne's ability to fulfill his job responsibilities. While Title VII shields an employee from retaliation for his opposition to unlawful employment practices [*See* 42 U.S.C. § 2000e-3(a)), the protection is not absolute. "[T]o qualify for the protection of the statute, the manner in which an employee expresses [his] opposition to an allegedly discriminatory employment practice must be reasonable." *Rollins v. State of Florida Dep't of Law Enforcement*, 868 F.2d 397, 401 (11th Cir. 1989). In other words, Title VII's anti-retaliation provision "was not intended to immunize insubordinate, disruptive, or nonproductive behavior at work." *Armstrong v. Index Journal Co.*, 647 F.2d 441, 448 (4th Cir. 1981); *see also Rollins, supra*, 868 F.2d at 401.

(3) **The Individual Defendants.** The Plaintiff has also sued defendants John Martin, Earl Smith, Dan Simple, and Rachael Booker in their individual capacities under Title VII. However, Title VII does not provide a cause of action against individual defendants, but only against "employers." *Cross v. Alabama, State Dept. of Mental Health & Mental Retardation,* 49 F.3d 1490, 1504 (11th Cir. 1995); *Busby v. CLW of Orlando,* 931 F.2d 764, 772 (11th Cir. 1991) ("Individual capacity suits under Title VII are . . . inappropriate."). Even though the Eleventh Circuit has held that district courts should not grant summary judgment *sua sponte* without notice [*see Lindsey v. United States Bureau of Prisons, United States Dep't of Justice,* 736 F.2d 1462, 1463 (11th Cir.), *vacated and remanded for other reasons,* 469 U.S. 1082, 105 S.Ct. 584 83 L.Ed.2d 695 (1984); *Milburn v. United States,* 734 F.2d 762, 765-66 (11th Cir 1984)], there is no legal or factual basis for Title VII claims against these defendants. The plaintiff simply cannot present any evidence to support such claims. Therefore these defendants are entitled to summary judgment.

III. CONCLUSION

For the reasons discussed above, there are no genuine issues of material fact and Defendant UWF is entitled to judgment as a matter of law. The motion for summary judgment is GRANTED. Further, because the Plaintiff is suing the individual defendants under Title VII, which provides liability only against "employers," the individual defendants also are entitled to summary judgment as a matter of law. The Clerk shall enter judgment for all defendants and against the plaintiff, together with taxable costs.

DONE AND ORDERED this 22nd day of October, 1996.

ROGER VINSON
United States District Judge

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED OCTOBER 31, 1997

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 96-3664
Non-Argument Calendar

D.C. Docket No. 95-CV-30274/RV

JAMES HAWTHORNE,

Plaintiff-Appellant,

versus

UNIVERSITY OF WEST FLORIDA, FLORIDA BOARD OF REGENTS, General Counsel, JOHN MARTIN, EARL SMITH, DAN SIMPLE, RACHAEL BOOKER,

Defendants-Appellees.

THE FLORIDA DEPARTMENT OF INSURANCE, Division of Risk Management,

Defendant.

Appeal from the United States District Court
for the Northern District of Florida

(October 31, 1997)

Appendix B

Before TJOFLAT, COX and CARNES, Circuit Judges.

PER CURIAM:

James E. Hawthorne appeals the district court's order granting the defendant's motion for summary judgment in Hawthorne's employment discrimination action. Having reviewed the briefs and the pertinent part of the record on appeal, we conclude that the district court properly entered summary judgment against Hawthorne.

AFFIRMED.

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* All of appellant's outstanding motions are DENIED. Appellee's motion to strike appellant's brief is GRANTED as to Issues 2 and 3 of that brief. Appellee's motion to strike supplemental correspondence is DENIED as moot.